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# Supreme Court of the United States.

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OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

*Petitioners,*

*vs.*

NORTHERN SECURITIES COMPANY, impleaded with NORTHERN PACIFIC RAILWAY COMPANY,

*Respondent.*

## Suggestions by Respondent in Answer to the Petition for a Writ of Certiorari.

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FRANCIS LYNDE STETSON and
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Petitioners

vs.

NORTHERN SECURITIES COMPANY, impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

## SUGGESTIONS BY RESPONDENT IN ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI.

Advanced copies of the Petition herein were furnished counsel for the Securities Company on the 15th inst., and formal service of it was made the next day. Petitioners' counsel also intimated that they should file a brief in support of the Petition; but Respondents' counsel were not favored with copies until the 20th instant.

The short interval between receipt of the Petition and supporting brief and the date fixed for the application, naturally has precluded preparation on Respondents' behalf of an argument upon the merits of the main controversy. Respondent therefore submits the question arising upon the Petition, without discussion of the rights of the parties in the property which Petitioners claim, and merely with some

suggestions which they think may be helpful to the Court in reaching a conclusion as to whether a writ as prayed for should be granted; and if it should be granted, in so ordering the further proceedings in this Court, that the time required for final disposition of the case may be shortened as much as possible, and the three thousand stockholders of the Securities Company be relieved as far as practicable from the great inconvenience and loss which the unavoidable delay incident to a revew by this Court of the decree of the Circuit Court of Appeals, would necessarily cause them.

The subject matter of the controversy is about 71,000 shares of the stock of the Northern Pacific Railway Company, which is in the possession of Respondent. It is not disputed that Respondent is the registered owner and holder of that stock; that it became so by the act of the complainants, the Petitioners here; that the stock was acquired from the Petitioners pursuant to the resolution quoted below; that the Petitioners were privy to this resolution, transferred the stock under it to Respondent, and received the consideration agreed upon in form of Securities stock and cash; that the Petitioners have applied to their own uses the cash which they received in consideration of transferring this Northern Pacific stock to Respondent, and have conveyed away the Securities stock which they received as the remaining consideration for the transfer, to the Equitable Trust Company as security for money borrowed to the extent of the par value thereof from a great number of bondholders. The Petitioners seek to get this stock away from Respondent substantially upon the ground that this Court decided in the Government suit that notwithstanding the transfer, the Petitioners still retain title to it.

The Circuit Court of Appeals did not so construe the decision of this Court.

The series of acts of the parties constituting the acquisition by the Securities Company from Harriman and Pierce of the

preferred and common stock of the Northern Pacific Railway Company, began with a special resolution of the Board of Directors of the Securities Company, passed at a meeting thereof, held on November 15, 1901, as follows:

"*Resolved*, That the President be, and hereby is authorized in behalf of this Company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,971 thereof in the fully paid-up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash; and that the officers of this Company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of the stock of this Company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the Preferred stock of the Northern Pacific Railway Company."

Record, p. 383.

It appears from the Record that this resolution was passed with blanks left for insertion of the amount of Northern Pacific stock to be acquired by the Securities Company, and the amount of its own stock and cash to be delivered to Harriman and Pierce in payment therefor; that these amounts were afterwards made definite and inserted in the minutes of the resolution, between the time of its passage, and the holding of the next meeting of the Board, which was on November 19; and that, at this latter meeting, the minutes of the next former meeting, containing the resolution in its completed form, were read to, and approved by the Board.

Record, pp. 297–299, 384.

As a director of the Securities Company, Mr. Harriman was present at, and participated in, this meeting of November 19.

Record, p. 384.

On March 14, 1904, the decision of this Court was announced, affirming the decree of the Circuit Court, in the suit

of the Government against the Respondent. Eight days afterward, on March 22, 1904, the Board of Directors of this Respondent considered the situation which the affirmance had created, and thereupon decided that there should be immediate and full compliance by Respondent with the purpose of the decree, and that a reduction of 99 per centum of its capital stock, and a ratable distribution among its stockholders of its holdings of Northern Pacific and Great Northern Railway stocks, as a resultant surplus, were necessary and desirable.

These holdings then were and now are 1,537,594 shares of Northern Pacific, and 1,181,200 shares of Great Northern; all of the par value of $100 each. Under the laws of the State of New Jersey, where Respondent is incorporated, propositions for reduction of capital must be submitted to a vote of stockholders, and be approved and assented to by the holders of at least two-thirds of all the outstanding stock of the corporation. Accordingly Respondents' Board, as part of its action, called a meeting of its stockholders, for April 21, 1904, to consider and take action upon the matter. On April 2, 1904, three of the Petitioners herein, Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company filed in the Circuit Court of the United States, for the District of Minnesota, their petition, asking leave to intervene in the Government suit; asserting that a distribution by Respondent here of its holdings of Northern Pacific and Great Northern shares would be in violation of their rights, and of the decree against Respondent in said suit; and praying for such orders of that court as should protect their interests in the premises. In other words, Harriman and Pierce, and the Oregon Short Line Company set up in the Minnesota court the same claims which they now seek to assert in the suit wherein their present Petition is filed. Upon the filing of the Minnesota petition, the petitioners gave notice of hearing upon it, for April 12, 1904; and, on that day, both parties appeared by counsel, who argued the matter at length: with the result that a few days

afterward the Circuit Court, four judges sitting, filed its decision dismissing the petition, and holding that the *pro rata* method of distribution in no way violated the decree in the Government suit, and that it would restore to the markets of the world the railway stocks, which, in view of the decree, would otherwise remain worthless. The opinion of the court was by THAYER, Circuit Judge, and appears in the pamphlet of opinions herewith submitted, on pp. 109–115.

As appears by that opinion, "the Government was satisfied "with the relief obtained, and expresses itself as satisfied at "the present time;" the reference being to a formal declaration signed by the Attorney-General, and then filed in open Court by the District Attorney of the United States for the Minnesota District.

In the meantime, the Continental Securities Company, another stockholder of Respondent, began suit against the Respondent in the Court of Chancery of the State of New Jersey, to restrain Respondent from carrying into effect the *pro rata* method of distribution, on the same ground as that urged by these Petitioners in the Minnesota and New Jersey Federal courts, and on the additional ground that such method would be violative of the rights of stockholders under the laws of the State of New Jersey, for the same reasons asserted by the Petition herein, in respect to this latter point.

Upon commencement of the suit, the plaintiff therein moved for a preliminary injunction; which was argued at length before Mr. Vice Chancellor BERGEN; who filed an opinion shortly after the hearing, sustaining the *pro rata* method, in every respect. The pleadings and opinion in that suit appear at length in the Record: pp. 301–323. For the convenience of the Court, the opinion has been separately printed, and is herewith submitted.

No proceedings for the review of this decision have ever been taken; and no challenge of its correctness has ever been made in the courts of the State of New Jersey.

It must therefore be regarded as settling the proposition, that the method of distribution proposed by Respondent is in accordance with the laws of the state of its creation.

Immediately following denial by the Minnesota Federal Court of the Petition for leave to intervene in the Government suit, the present suit was begun in the Circuit Court of the United States for the District of New Jersey.

No authority recognizes difficult or doubtful questions of law as forming sufficient ground for tying up property for a lengthy period. The exigency arising from the existence of law questions, however difficult or doubtful, is fully and fairly covered by preservation of the *status quo* merely long enough to allow fair preparation for argument, and reasonable advisement afterwards by the court. Such questions might be, although no case has been found where they actually have been, regarded sufficient reason for an *ex parte* injunction running until a fair hearing could be obtained, and the court could reasonably consider the case; but no longer. Any and every right of preparation to which plaintiff could be entitled, under the utmost stretch of favor, was certainly exhausted in the Circuit Court.

On April 20, 1904, an *ex parte* injunction, in the form of a stay order, was issued.

(R. p. 195).

This order remained in force until superseded by the order appealed from.

The motion came on for argument on May 20, and the hearing occupied three days. Lengthy original and reply briefs were submitted on both sides. The plaintiffs amended their bill twice; the case now rests on the Second Amended bill. The oral argument terminated on May 23. The case was held under advisement until July 20, when the decision and opinion of the Circuit Court were filed.

Neither the restraining order, nor the special injunction following it, forbade action by the stockholders, on the question of reduction of capital and distribution of assets. The special meeting of the stockholders, to act on those questions was therefore held at the designated time, viz., on April 21, 1904; and the reduction and distribution were ordered by the affirmative votes of nearly three-fourths of all the stockholders; of all save the Petitioners here, and others holding altogether about four or five per cent. of the total of Respondent's stock.

Record, pp. 329-330.

Any and all right which plaintiffs originally might have had, of opportunity for preparation, argument, and decision of the law questions in the case had by the time of the making of the injunctive order been exhausted, and no further delay on the ground of the existence of such questions could rightfully be imposed on the Securities Company. Nevertheless, it was imposed; and the opportunity for preparation was again extended from July 20 to the date of argument in the Circuit Court of Appeals. Petitioners cannot urge the existence of difficult law questions as a ground for still further retaining the injunction.

The plaintiffs were heard there with like effect as if the appeal had been their own. They had the benefit of a full consideration of their case, and a judgment of their rights, by the Court to which alone an appeal therein could be taken from a final decree of the Circuit Court.

The opportunity of obtaining the opinion of the Circuit Court of Appeals which was strongly pressed for by plaintiff in the Circuit Court, both orally and on all their printed briefs, and preserved for them by the order of the latter court, has been accorded to them.

By its appeal from the ruling of the Circuit Court, the Securities Company necessarily undertook to satisfy the Appellate Court that the motion papers exhibit plaintiffs' case in full; that every essential transaction and fact composing it was then before the court, in all amplitude; and, consequently, that the duty of the appellate court was merely to apply to the established facts the principles of law governing the ultimate rights of the parties; in other words, to dispose of the application for an injunction on the merits of the case In the Circuit Court, the Securities Company opposed an injunction solely on the ground that the plaintiffs were shown to have no case. Questions of procedure were not mooted.

The facts necessarily consist of the things done and intended by Harriman and Pierce, on the one part, and the Securities Company on the other. On these points this record is complete. It contains all. Nothing more could be supplied. The sources of information are exhausted.

Furthermore, there is no material dispute or difference between the parties as to what was done and actually intended by them.

In the spring of the year 1901, at the instance of, and with money furnished by the Union Pacific Railway Company, there were purchased, of the preferred stock of the Northern Pacific Railway Company, $41,085,000 out of $75,000,000, and of common stock of that company $37,023,000 out of $80,-

000,000; thus a majority of the total $155,000,000 of capital stock of the Northern Pacific Company.

Mr. Harriman's deposition before the Interstate Commerce Commission discloses the connection of the Union Pacific with this purchase:

"MR. DAY: What is the total capital stock of the Oregon Short Line?

MR. HARRIMAN: I think between twenty-seven and twenty-eight millions.

MR. DAY: It purchased how much stock of the Northern Pacific?

MR. HARRIMAN: Seventy-eight millions.

MR. DAY: How did it pay for that stock?

MR. HARRIMAN: Some in cash and some by issuing its own obligations against that stock.

MR. DAY: How much cash did it pay approximately?

MR. HARRIMAN: Fifteen or twenty million dollars.

MR. DAY: That came out of its own treasury.

MR. HARRIMAN: Yes, sir.

MR. DAY: How was the money raised by the Oregon Short Line to acquire the balance of $60,000,000?

MR. HARRIMAN: By issuing its own certificates of indebtedness.

MR. DAY: Who did it issue the certificates to? What I want—

MR. HARRIMAN: What you want is to find out if the Union Pacific had any interest in that purchase?

MR. DAY: Yes, sir.

MR. HARRIMAN: I want to be frank about it. The Union Pacific helped the Oregon Short Line to finance it and purchased from the Oregon Short Line the certificates of indebtedness, the money for which it was used paying for the Northern Pacific stock.

MR. DAY: The sixty-one millions of that purchase money came out of the Union Pacific treasury, practically?

MR. HARRIMAN: Yes, sir.

MR. DAY: Directly or indirectly?

MR. HARRIMAN: Yes, sir.

R., pp. 243, 244.

It was further disclosed by Mr. Harriman, in the same examination, that the Union Pacific Railway Company is owner of practically the entire capital stock of the Oregon Short Line Railroad Company (R., p. 242), and that this latter company is in turn owner of practically the entire capital stock of the

Oregon Railway and Navigation Company (R., p. 247). The court will take notice, without special proof, of the geography of the country, of the location of the prominent transportation systems, and of the public laws of the several states, as well as of the United States, on the subject of railway combinations.

The railways of the Union Pacific Railway Company, the Oregon Short Line Railroad Company, and the Oregon Railroad and Navigation Company, comprise the Union Pacific Railway System, which extends from the Missouri River westward, through the states of Nebraska, Wyoming, Colorado, Utah, Montana, Idaho, Washington and Oregon, to the Pacific coast, at Portland, and is a close competitor of the Northern Pacific Railway Company for both the east and west bound traffic of a large section of each of the four states last named.

These facts characterize the purchase of the Northern Pacific stock, by the Union Pacific system, as a scheme to secure control of a powerful competitor in the interstate trade. This record discloses no trace of a present purpose to abandon that plan. This suit is manifestly a mere step in realizing it.

While acquisition by the Union Pacific system of $71,732,062 of Northern Pacific stock would not give that system a majority of the entire capital stock of the Northern Pacific Company, yet for every practical purpose it would give quite a sure control of that Company. Corporations are controlled by stockholders' meetings; and the stock which makes the action of the company is not the totality of stock outstanding, but merely that part of the whole which attends the meetings.

Experience shows that only in rarest instances is the whole body of any stock represented at meetings.

Under the Northern Pacific charter, a majority of all the shares is required for a quorum; but the majority of any quorum suffices to determine the action of the meeting.

The amount of Northern Pacific stock which plaintiffs here ask the court to take from the Securities Company, and hand over to the control of Union Pacific, forms almost exactly 46 3/10 per cent. of the entire capital stock of the Northern Pacific Company. It would be a majority at every stockholders' meeting where not more than 92 1/2 per cent. of the total should be present. But no one with experience in such matters would expect so large a percentage of the stock of a great corporation ever to assemble. To all practical certainty, the Union Pacific holdings of Northern Pacific stock would be a majority of all stock represented at any meeting; and whenever the question is of the effect of placing a large body of corporate stock in a given hand, experience must be the guide.

In the *Pearsall* case, this Court considered that acquisition by a railway company of a proportion of the stock of a competitor, less than a majority, would be inimical to a state statute forbidding one railway corporation to obtain control over another owning, or otherwise controlling, a parallel or competing line.

161 *U. S.*, 646.

Plaintiffs therefore come here asking the court to place control of the Northern Pacific system of railways in the hands of the Union Pacific Railroad Company.

The distribution of the railway stocks proposed by the Securities Company will scatter the holdings of them so widely, that but a small fraction of the whole will concentrate in a single interest. The individual defendants in the suit of the United States against the Securities Company and others, and all other persons referred to in the evidence in that case as having been consulted about the formation of the Securities Company, hold altogether but 996,016 shares of the stock of the Securities Company out of a total of 3,954,000

shares. A ratable distribution of the railway stocks would vest in all those defendants and consulted persons, combined, 378,224 shares, or 24–9/10 per cent. of the total Northern Pacific stock, and 297,493 shares, or 23–8/10 per cent. of the total Great Northern stock.

The Union Pacific interests would get 320,706 shares or 20–69/100 per cent. of the stock of the Northern Pacific, and 246,389 shares, or 19–71/100 per cent. of the stock of the Great Northern. The residue of the stock of each railway company comprising more than a clear majority of each, would be scattered among nearly 3,000 separate holders, not originally concerned in the formation of the Securities Company.

(Record p. 324.)

The plan of distribution of the Securities Company is therefore to utterly dissolve the combination condemned in the Government suit, and to diffuse the ownership and control of the railway stocks among thousands of separate holders, while the plaintiffs' plan would merely substitute another combination still more dangerous and offensive than the original one.

The fact that *pro rata* distribution will give each stockholder of the Securities Company shares in both railway companies, forms no objection to that plan. Each one's holdings will be individual and distinct from those of every other one; and the process of scattering the holdings still farther, may be relied on to begin at once. Holding of the stocks of competing corporations, by the same body of stockholders, is perfectly lawful. This court expressly settled that point in the *Pearsall* and *Louisville & Nashville* cases, in 161 U. S.

The circumstances under which this Court may, and having the appropriate jurisdiction will, review by *certiorari* the orders and judgments of inferior courts not reviewable by appeal or writ of error, are not clearly defined. Likely they

would not be susceptible of perfect definition; but counsel for Respondent are unable to perceive the smallest basis, either in matter of right or in matter of precedent, for the taking, by this Court, of jurisdiction over the question whether the special injunction here shall stand or be vacated.

If any precedent exists for issuance of a *certiorari*, to review a decree of the Circuit Court of Appeals, reversing an injunction order of the Circuit Court, standing alone and disassociated from any final decree covering the same controversy, counsel for respondent has not heard of it, nor been able to find it. Issuance of a *certiorari* here could be regarded only as the making of a new precedent; not the following of an existing one.

As finally established by this Court in a series of decisions, of which the latest is *Forsyth v. Hammond* (156 U. S. 506–514), the power of this Court to review by *certiorari* an interlocutory decree even when associated with a final decree, is a "power "which will be sparingly exercised and only when the circum- "stances of the case satisfy the Court that" (except in four contingencies specified in that decision and not now presented) "the importance of the *question* involved * * * "demands such exercise." But, here there is not involved any *question* important within the meaning of the cited rule. The *amount* involved, particularly the amount of dividends long withheld from suffering stockholders, is vastly important, but that cannot in this Court impart importance to questions which in themselves are comparatively simple, and have been answered adversely to petitioner's contentions by every Court that has undertaken to answer them at all. In no ordinary case would this Court burden itself with the review of such questions, unless upon a review of a final decree after hearing. The amounts involved, vast as they are, cannot compel the exceptional attention of this Court. Neither are they beyond the power of the defendants to respond in money damages which would be the meas-

ure of the possible relief of petitioners, vainly and unlawfully clamoring for a practical majority of the Northern Pacific stock *in specie* in order to vest its control in the rival Union Pacific System.

For all reasons above suggested respondent firmly opposes the granting of the writ.

Nevertheless, if counsel for Respondent mistake, and the Court should be of opinion that it has power to issue the writ in such instances, and that the present instance is one properly calling for the exercise of such power, they feel they could not too strongly press upon the attention of the court the hardship that such a determination would unavoidably carry to thousands of Respondent's stockholders, scattered through many countries, who not only have been innocent of all intent of wrongdoing, but were as ignorant of the plans of the promoters of Respondent's formation as any stranger could be.

The stockholders of Respondent have from the beginning been a body of investors and not a body of speculators. They rely upon the revenues from their Securities stock, to meet their regular financial needs. Multitudes of them are women. Other multitudes are estates of deceased persons and minors. A considerable number are institutions of learning and charities, which hold this stock as part of their endowment, upon which the support of the establishment is largely dependent.

Since the affirmance by this Court of the decree of the Circuit Court, in the Government suit, the Northern Pacific and Great Northern Railways have each earned net revenues enabling it to declare and pay a regular quarterly dividend at the rate of seven per cent. per annum ; the dividend dates being February, May, August, and November, of each year.

The supersedeas on the appeal from the decree of the Circuit Court enabled the Securities Company to collect from the railway companies the dividend of February, 1904, on its holdings of their shares; and to distribute the same among its own stockholders, through its own dividend paid at the beginning of the same month. The affirmance by this court of the decree in the Government suit in March, followed by the restraining order procured by plaintiffs in the present suit, in April, 1904, and the special injunction awarded in July, has operated to prevent payment by the railroad companies to any one of any part of the dividends since declared on their shares held by the Securities Company. Including the one for February 1, 1905, recently declared, in regular course, these dividends are four in number; and on the shares held by Respondent, aggregate over $19,000,000. By operation of the injunction in this suit, that vast sum is not only detained from those to whom indisputably it belongs, but remains tied up in the hands of the railway companies, and thus removed from the channels of business circulation.

Counsel for Respondent therefore respectfully suggest, that if, against Respondent's earnest objection and protest, this honorable Court shall determine to grant the writ prayed for, it be granted on condition, firstly, that the case be set down for hearing and argument at such early date as will permit the earliest practicable decision and final disposition thereof, by this Court, consistent with the requirements of justice; and, secondly, that, pending the final disposition of the case here, this honorable Court make such order, or give Respondents leave to apply to the Circuit Court of the United States, for the District of Minnesota, for such order in the Government suit, as will permit the accumulated dividends of the railway companies to be paid out by them as part of the distribution of assets which this Respondent is endeavoring to make, and

will make, as soon as the restraint imposed by the injunction in this suit has been removed.

Petitioners could not be hurt by such partial distribution of assets; for, by confession of their bill, they have in hand the $8,915,629 cash, paid Harriman and Pierce by the Respondent, as part of the price of the Northern Pacific shares they transferred to it, and for which the bill offers to account. This cash fund, in their own possession, will amply protect them.

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